



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-66/55997

PRELIMINARY RECITALS

Pursuant to a petition filed December 17, 2002, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Washington County Dept. of Social Services in regard to Medical Assistance (MA), a telephone hearing was held on January 23, 2003, at West Bend, Wisconsin.

The issue for determination is whether the county agency correctly denied petitioner's October, 2002 Institutional MA application due to divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Representative:

Attorney John Kitzke
Kitzke & Mason
114 Main Street
P.O. Box 431
Kewaskum, WI 53040

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Maxine Ellis, ES Supervisor
Washington County Dept Of Social Serv
333 E. Washington Street
Suite 3100
West Bend, WI 53095

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) has been a resident of Samaritan Nursing Home in Washington County since June 12, 2002. The petitioner's wife is a community spouse who was born x, 1913. See Exhibit 3.
2. At the time that petitioner entered X Nursing Home, he and his wife had total assets of \$191,226. See Exhibit 3.
3. On or about July 24, 2002, petitioner set up a Wisconsin Limited Liability Company (LLC) in which the \$191,226 was transferred into FLHF Investments LLC. That LLC was and is owned and operated by petitioner's two daughters as Managing Partners: XX and XXX. See Exhibit 7 & 8. The petitioner and his wife were only "Members." See Exhibit 8.
4. XX has durable power of attorney and XXX is "Standby Attorney." See Exhibit 13 (May 23, 2002 General Durable Power of Attorney).
5. On or about September 17, 2002, petitioner transferred his interest in all of his assets to his spouse (including his interest in FLHF Investments LLC). See Exhibit 9.
6. On October 1, 2002, petitioner's wife "purchased" an annuity with \$100,000 of assets from the LLC. This annuity made monthly payments to the community spouse of \$1,584.02 (4% interest) as of November 1, 2002. Those payments will continue for 71 payments with a final payment on September 1, 2008. See Exhibits 6 & 4.
7. After the purchase of the \$100,000 annuity on October 1, 2002, the petitioner's wife had assets of \$52,991 in the FLHF Investment LLC. See Exhibit 4.
8. On October 17, 2002, petitioner's daughter and POA, XX, applied for Institutional MA on behalf of her father, the petitioner. See Exhibit 3.
9. During the months of June, July, August and September, 2002, XX transferred \$4,200 per month to her own account (for a total transfer of \$16,800). See Exhibits 18 & 19.
10. The county agency sent a November 15, 2002 negative manual notice to the petitioner stating that his Institutional MA application was denied due to divestment. The county agency determined the divestment ineligibility to end as of July 31, 2005. See Exhibits 1 & Exhibits 14-19.

DISCUSSION

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; MA Handbook, Appendix 14.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; Handbook, App. 14.3.0. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services.

The Wisconsin State statutes, administrative code and MA Handbook all provide directives regarding the classification and treatment of a divestment of assets. Wis. Stat. § 49.453(2), Divestment of Assets, provides the specifics as follows:

(2) INELIGIBILITY FOR MEDICAL ASSISTANCE FOR CERTAIN SERVICES.

- (a) Institutionalized individuals. Except as provided in sub. (8), if an institutionalized individual or his or her spouse, or another person acting on behalf of the institutionalized

individual or his or her spouse, transfers assets for less than fair market value on or after the institutionalized individual's look-back date, the institutionalized individual is ineligible for medical assistance for the following services for the period specified under sub. (3):

1. For nursing facility services.
2. For a level of care in a medical institution equivalent to that of a nursing facility.

The Wisconsin Administrative Code § HFS 103.065(4)(a) defines “divestment” as follows:

(4) DIVESTMENT. (a) Divestment resulting in ineligibility. An institutionalized individual or someone acting on behalf of that individual ***who disposes of resources at less than fair market value*** within 30 months immediately before or at any time after the individual becomes institutionalized if the individual is receiving MA on the date he or she becomes institutionalized or, if the individual is not receiving MA on that date, within 30 months immediately before or at any time after the date the individual applies for MA while institutionalized, shall be determined to have divested. (emphasis added)

The MA Handbook states: “Divestment” is the transfer of income, non-exempt assets, and homestead property, which belong to an institutionalized person or his/her spouse or both:

1. For less than the fair market value of the income or asset
2. By an institutionalized person

MA Handbook, Appendix 14.2.1

Wis. Stat. § 49.453(4) specifically addresses divestment of assets to irrevocable annuities:

(4) **IRREVOCABLE ANNUITIES.** (a) For the purposes of sub. (2), whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets to an irrevocable annuity in an amount that exceeds the expected value of the benefit, the covered individual or his or her spouse transfers assets for less than fair market value.

(b) The amount of assets that is transferred for less than fair market value under par. (a) is the amount by which the transferred amount exceeds the expected value of the benefit.

(c) The department shall promulgate rules specifying the method to be used in calculating the expected value of the benefit, based on 26 CFR 1.72-1 to 1.72-18, and specifying the criteria for adjusting the expected value of the benefit based on a medical condition diagnosed by a physician before the assets were transferred to the annuity.

In this case, on or about July 24, 2002, petitioner set up a Wisconsin Limited Liability Company (LLC) in which he transferred \$191,226 into FLHF Investments LLC. Then, on or about September 17, 2002, the petitioner transferred all of his assets, including his interest in the FLHF Investment Limited Liability Company, to his wife. See Finding of Fact #3. During the hearing, the county agency contended that

such transfer was divestment because the petitioner did not receive any value in return for the assets that were transferred into the LLC and therefore are no longer available to him per MA Handbook, Appendix 14.2.9. The county agency is in part correct and in part is incorrect.

The petitioner's act of transferring the total assets of \$191,226 into the LLC was not in itself necessarily a divestment. The petitioner's act on September 17, 2002 to transfer his interest in all of his asset to his spouse (including his interest in FLHF Investments LLC) was not a divestment. Medical Assistance law and policy permit the transfer of assets to a spouse as an exception to the divestment provisions.

14.4.0 Exceptions

A divestment that occurred in the lookback period or any time after does not affect eligibility if any of the following exceptions apply:

8. The institutionalized person or his/her community spouse divest a nonhomestead asset or assets to:

a. Spouse.

(Emphasis added).

MA Handbook, Appendix 14.4.0 (04-1-01).

On October 1, 2002, petitioner's wife purchased an annuity with \$100,000 of assets from the LLC. This annuity made monthly payments to the community spouse for a period of time that is within her life expectancy and met the requirements of the MA Handbook, Appendix 14.11.0, "Annuities." As a result, (petitioner's spouse) purchase of the \$100,000 annuity was also not a divestment.

However, at this point, the county agency is correct that a divestment occurs. In Exhibit 4, Attorney Kitzke claimed that after the \$100,000 annuity purchase the petitioner's wife had assets of \$52,991 in the FLHF Investment LLC. A copy of the LLC Member Operating Agreement is provided in Exhibit 7. The terms of that agreement make clear that the "management of company shall vest in the Managing Members." (Article II). The Managing Members are petitioner's two daughter per Article XI. Article XI, Section 1 provides that: "The following members are hereby appointed as initial Managing Member(s) of Company, **with each to have full power to act alone** as if they were the sole Managing Member." (Emphasis Added). Clearly, petitioner's daughters have the sole power with this LLC and not (petitioner's spouse) and the petitioner who are only "new members" joining the LLC. See Exhibit 8. The petitioner's wife functions as an investor in the LLC, but not a party who can control or have access to the funds remaining in the LLC.

The MA Handbook provides that if an MA client or his/her spouse uses an asset in a way to makes it **unavailable** and doesn't receive fair market value (FMV), treat that asset as divestment. MA Handbook, Appendix 14.2.10, "Unavailability." In this case, the \$52,991 is "unavailable" to petitioner's spouse as she is not one of the Managing Partners of the LLC but only a new member without authority in the LLC. Therefore, the \$52,991 is a divestment as of October 1, 2002. See Findings of Fact #4-#6.

A limited liability company interest is "personal property" by definition. Wis. Stat. § 183.0703. Second, all "...property originally transferred to or subsequently acquired by or on account of a limited liability company is property of the limited liability company and not of the members individually." Wis. Stat. § 183.0701(1).

Clearly, a transfer has occurred in this case as a consequence of the original liquid asset “contribution” of \$191,226 in cash by petitioner and his wife to the LLC. The petitioner then transferred all of his interest in the \$191,226 to his wife on September 17, 2002. That asset was personal property “received”, held and used by the LLC for the business purpose of the LLC.

In so transferring the cash asset to the LLC, the petitioner, *by his power of attorney/daughter*, who is only a “new member” of the LLC, has changed the fair market value of the original liquid cash asset into an “interest” in the LLC. Therefore, the petitioner and his wife can no longer access unilaterally under the terms of operation of the LLC until dissolution of the LLC per Article X of the Agreement.

It appears that the petitioner is arguing that the LLC was created as an investment to generate income for petitioner’s wife’s support. However, such a complex legal mechanism is not necessary to get an approximate 4% interest of \$1,584 from a \$100,000 annuity, which was available from many bank CDs. Instead, the underlying motive seems to be to remove the funds (other than the \$100,000 annuity) as the petitioner’s countable asset and make him eligible for MA as of October 17, 2002.

Likewise, the LLC “interest” (petitioner's spouse) now owns in the approximately \$52,991 is so limited in terms of transferability, assignability, and liquidity as to be virtually worthless in any kind of fair market. The two Managing Partners must unanimously consent to the return of the petitioner’s original contribution or to the transfer, assignment, mortgaging, or pledging as security for a loan of her interest in the company. No prudent, responsible, or reasonable purchaser would purchase such a unique, family held, closely held, and restricted instrument as an investment.

During the hearing, Attorney Kitzke focused on the annuity and why the \$100,000 annuity was not a divestment. However, the petitioner has not provided any convincing argument why the \$52,991 should not be considered a divestment as of the petitioner’s October 17, 2002 application for Institutional MA.

On another issue, Attorney Kitzke is not contesting that XX's transfer of \$4,200 from her parent’s assets (or from the LLC) to her own account during June, July, August, and September, 2002 was a divestment. However, Mr. Kitzke contended that such divestment penalty period passed prior to the October 17, 2002 MA application. The MA Handbook explains that the penalty period begins with the month of divestment and extends for the number of months that result from dividing the divested amount by the average nursing home cost to a private pay patient (\$4,292). MA Handbook, Appendix 14.5.0, “Penalty Period.”

However, the divestment amount is not only the \$16,800, but also the \$52,991 which became an unavailable asset to the petitioner’s wife. \$52,991 plus \$16,800 equals a total divestment of \$69,791. I conclude that petitioner’s representative has not produced any evidence showing that petitioner’s wife’s “interest” in this LLC as an investor has any marketability or fair market value. Accordingly, the petitioner has divested \$69,791 as of the date of his October 17, 2002 Institutional MA application. The county agency needs to recalculate the divestment ineligibility period and send a new Notice of Decision to the petitioner regarding his October 17, 2002 Institutional MA application.

CONCLUSIONS OF LAW

1. The county agency correctly denied petitioner's MA-Institutional application due to divestments.
2. The county agency needs to recalculate the divestment ineligibility period and send a new Notice of Decision to the petitioner regarding his October 17, 2002 Institutional MA application.

NOW, THEREFORE, it is

ORDERED

The matter is remanded to the county agency (**Attention: ES Supervisor Maxine Ellis**) with instructions to recalculate the petitioner's divestment ineligibility period and send a new Notice of Decision to the petitioner regarding his October 17, 2002 Institutional MA application, within 10 days of the date of this Decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 19th day of
March, 2003

/sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals
41/GMW